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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185
	)	
Area Code Relief Plan for Dallas and Houston, Ordered by the Public Utility Commission of Texas	)	NSD File No. 96-8
	)	
Administration of the North American Numbering Plan	)	CC Docket No. 92-237
	)	
Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois	)	IAD File No. 94-102

U S WEST RESPONSE TO THE RECONSIDERATION PETITIONS CONCERNING THE SECOND REPORT AND ORDER

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SUMMARY

In these comments, U S WEST, Inc. makes a number of observations on various petitions concerning the Commission's Second Report and Order in CC Docket No. 96-98.

A key area of concern involves petitions concerning number portability. U S WEST is initially concerned that the method of allocating costs for the administration of number portability may not be competitively neutral, as required by the Act. The Commission's method for allocating such costs -- gross telecommunications services revenues net of payments to other carriers -- has the potential to be competitively neutral if facilities-based LECs are permitted to charge an appropriate share of their own allocation directly to resellers and other LECs using their facilities. Otherwise, of course, this method of apportionment would not be competitively neutral at all. However, the gross revenue method of apportionment is still not guaranteed to be competitively neutral in practice. U S WEST recommends that the Commission instead adopt the apportionment method recommended by a variety of petitioners and use retail revenues only as the allocator for the NANP administration costs.

A second area of concern involving number administration concerns area code guidelines. U S WEST submits that number portability should not be a precondition to use of area code overlays because it is critical that nothing delay the implementation of new area codes. State commissions should continue to exercise the allocation of remaining central office codes in an overlay situation. Finally, the

Commission, in dealing with activity regarding area codes, must recognize that CMRS providers can be severely inconvenienced whenever area codes are changed because such a change requires that CMRS carriers manually re-program each of their customers handsets as part of the change. Thus, mandatory "take-back" of numbers in a geographic split is not technology neutral, and no CMRS provider with Type 2 connections should be faced with a mandatory "take-back" of its numbers.

U S WEST is also supportive of petitions filed by SBC Corporation and others which demonstrate that various parts of the Commission's Second Report and Order dealing with databases would unlawfully interfere with the intellectual property rights of incumbent LECs and equipment vendors alike. The Second Report and Order can be modified to accommodate these rights fairly easily, and the Commission should undertake to accomplish this result.

Finally, U S WEST is supportive of petitions which seek to have the network disclosure obligations broadened to include all carriers -- both in terms of the duty to make network disclosure and in terms of the right to receive appropriate disclosure documents. Disclosure of interfaces seems to be a fundamental duty of carriers operating under the Communications Act, and, to the extent that this duty is not clear, the Commission should act to make it so.

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U S WEST RESPONSE TO THE RECONSIDERATION
PETITIONS CONCERNING THE SECOND REPORT AND ORDER

U S WEST, Inc. ("U S WEST") submits this response to address the myriad of issues raised by the many petitions for reconsideration and clarification filed in response to the Federal Communications Commission's ("Commission") Second Report and Order.[1]

I. NUMBER ADMINISTRATION ISSUES

[1] In the Matters of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, et al., CC Docket Nos. 96-98, et al., Second Report and Order and Memorandum Opinion and Order, FCC 96-333, rel. Aug. 8, 1996 ("Second Report and Order" or "Order").

U S WEST below addresses three of the issues raised in connection with the number administration portion of the Second Report and Order: (a) the proper method of allocating among carriers the costs of administering the North American Numbering Plan ("NANP"); (b) the proper limits on so-called "code opening" fees; and (c) the appropriate guidelines pertaining to implementation of new area codes.

A. Depending On Its Application, The Commission's NANP Administration Cost Allocation Method May Not Be "Competitively Neutral" And, As Such, May Be Inconsistent With The Telecommunications Act of 1996

U S WEST must agree with those petitioners who have demonstrated that the method the Commission adopted for allocating the costs of NANP administration among carriers -- gross telecommunications services revenues net of payments to other carriers -- is not competitively neutral and, as such, is inconsistent with the Telecommunications Act of 1996.[2]

Congress specified in Section 251(e)(2) that the cost of numbering administration "shall be borne by all telecommunications carriers on a competitively neutral basis."[3] In its Second Report and Order, the Commission held that the "gross revenues" cost allocation method it adopted in its 1995 NANP Order did not meet this statutory standard because it was not competitive neutral:

> Contributions based on gross revenues would not be competitively neutral for those carriers that purchase telecommunications facilities and services from other telecommunications carriers because the carriers from whom they purchase services or facilities will have included in their gross

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[2] See Petitions of BellSouth at 7; NYNEX at 2-4; SBC at 19-20; USTA at 5-6.

[3] Telecommunications Act of 1996, 110 Stat. 56, 64 § 251(e)(2) ("1996 Act").

revenues, and thus in their contributions to number administration, those revenues earned from services and facilities sold to other carriers.[4]

To avoid such a competitively disparate outcome, the Commission instead required all carriers "to subtract from their gross telecommunications services revenues expenditures for all telecommunications services and facilities that have been paid to other telecommunications carriers."[5]

U S WEST agrees that the original "gross revenues" allocator is not competitively neutral, at least if facilities-based carriers are permitted to assess the costs assigned to them for number administration directly on the services provided by resellers. But the replacement allocator the Commission adopted -- gross revenues net payments to other carriers -- could likewise not be competitively neutral in a variety of circumstances. In fact, depending on the application of this new approach, the "net payments" allocator may be even less competitively neutral than the "gross revenues" allocator the Commission rejected as being inconsistent with Section 251(e)(2).

Consider the case of three carriers, each providing exchange telecommunications services in the same market and each serving retail customers which generate revenues of $1 million. Assume one carrier is a facilities-based landline local exchange carrier ("LEC"), another carrier is a facilities-based Commercial Mobile Radio Service ("CMRS") provider, and the third carrier is a reseller which resells the landline and wireless services of the other two carriers

[4] Second Report and Order ¶ 343.

[5] Id.

(paying them 80% of its revenues for their resold services). Assume further that total NANP administration costs are $100,000. The following table confirms that the "gross revenues" allocator (rejected by the Commission) is not competitively neutral:

Impact of "Gross Revenues" Allocator

	Retail Revenue	Wholesale Revenue	Total Gross Revenue	Percent of NANP Costs Carrier Must Recover	Assigned NANP Costs
Facilities-LEC	$1M	$0.4M	$1.4M	37%	$37,000
Facilities-CMRS	$1M	$0.4M	$1.4M	37%	$37,000
Reseller	$1M	0	$1M	26%	$26,000
TOTAL	$3M	$0.8M	$3.8M	100%	$100,000

In this example, the industry generates total revenues of $3.8 million, and allocating NANP costs based on each carrier's percentage of total gross revenues would appear at first blush to be competitively neutral. But this gross revenues allocator is not competitively neutral when the three carriers attempt to recover their portion of the NANP costs from their customers, the ultimate beneficiaries of number administration. Using the settled principles of cost-causation, the two facilities-based carriers would recover their assigned portion of NANP costs ($37,000) from both their retail and wholesale customers -- allocating $26,000 (or 71% of their assigned NANP costs) to their retail customers and the remaining

$11,000 (or 29% of their NANP costs) to their wholesale customer, the reseller.[6] Under this cost-causation approach, the facilities-based carriers would assess a NANP administration surcharge of approximately 2.65¢ for each dollar of retail services sold and the same 2.65¢ for each dollar of wholesale (or resold) services sold.

The Commission acknowledged the competitive inequality of using a gross revenues/cost-causation recovery method in the Second Report and Order. In an attempt to address this inequality, it decided that the solution was to use a "gross revenues net payments" allocator so the wholesale/resold revenues were not counted twice. This new "net payments" allocator would have the following impact in our example:

Impact of "Gross Revenues Net Payments" Allocator

	Total Gross Revenue	Net Payments to Others	Considered Revenue	Percent of NANP Costs Carrier Must Recover	Assigned NANP Costs
Facilities-LEC	$1.4M	$0	$1.4M	47%	$47,000
Facilities-CMRS	$1.4M	$0	$1.4M	47%	$47,000
Reseller	$1M	$0.8M	$0.2M	6%	$6,000
TOTAL	$3.8M	$0.8M	$3.0M	100%	$100,000

This approach would be competitively neutral in effect only if the two facilities-based carriers were permitted to use settled principles of cost-causation by

[6] The 71% and 29% allocators are obtained by dividing $1 million/$1.4 million and $400,000/$1.4 million. U S WEST has rounded all the figures in the text to simplify the presentation.

allocating a pro-rata portion of their assigned NANP costs to the reseller. Under this approach, all three carriers would ultimately face NANP administration costs of approximately $33,400, which they would each recover from their respective retail revenues of $1 million.[7]

The petitioners appear to believe, however, that this Commission will preclude facilities-based carriers from including in the prices of their wholesale services (be it access, network elements or resold services) a pro-rata share of the NANP administration costs assigned to them as a result of these wholesale revenues.[8] If so, the approach would clearly not be competitively neutral. This concern is unwarranted. For example, Section 252(d)(3) permits a facilities-based carrier to charge a reseller its retail rate minus the costs it will avoid by engaging in resale. Under a "gross revenues net payments" allocator, a facilities-based carrier would not avoid the allocation of NANP administration costs in providing resold services. Network elements would similarly bear a reasonable share of these costs.

More fundamentally, precluding facilities-based carriers from assessing on the reseller a pro-rate share of their assigned NANP administration costs would

[7] The two facilities based carriers would allocate their total assigned NANP costs ($47,000) using the 71% and 29% retail/wholesale allocator discussed above. This would result in allocating approximately $33,350 of their assigned NANP costs to their retail services and approximately $13,650 to their wholesale services (billed to the reseller). The reseller, in turn, would face total assigned NANP costs of $33,300: $6,000 directly assigned using the "gross revenues net payments" allocator, and $27,300 which the two facilities-based carriers would bill the reseller.

[8] NYNEX says that paragraphs 5, 713 and 730 of the First Report preclude facilities-based carriers from including number costs in their wholesale prices.

unquestionably contravene the "competitively neutral" mandate of Section 252(e)(2). In our example, the reseller would be allocated only $6,000 in NANP administration costs, a sum it would recover from total revenues of $1 million (or 0.6¢ per retail dollar). In stark contrast, the two facilities-based carriers would each be allocated $47,000 in NANP costs, a sum each would recover from only $1 million in retail revenues (or 4.6¢ per retail dollar). Under no circumstances could it be said that this result is "competitively neutral." We do not read the Commission's rules as precluding proper cost assignment.

An alternative approach, one guaranteed to ensure competitive neutrality, is to allocate total NANP administration costs among carriers considering retail revenues only, as evidenced by the following table:

Impact of "Retail Revenues" Allocator

	Total Retail Revenues	Percent of NANP Costs Carrier Must Recover	Assigned NANP Costs
Facilities-LEC	$1M	33.4%	$33,300
Facilities-CMRS	$1M	33.3%	$33,300
Reseller	$1M	33.3%	$33,300
TOTAL	$3M	100%	$100,00

Number administration benefits all users of telecommunications services (state and interstate) and the costs of administering numbers should accordingly be spread over (and recovered from) all retail end users by the carriers which serve them. This, in turn, requires distributing NANP administration costs among carriers for recovery on the basis of their proportion of retail end users. All allocation based on retail telecommunications revenues best distributes costs among carriers in proportion to their retail presence -- that is, in proportion to their ability to spread NANP costs among the ultimate beneficiaries of NANP administration. A further advantage of a "retail revenues" approach is that it is simpler to administer and will involve much less controversy because carriers need not pass through to other (wholesale) carriers NANP administration costs assigned to them.

In summary, U S WEST recommends that the Commission replace the current "gross revenues net payments to other carriers" allocator with the simpler "retail revenues only" allocator. Alternatively, if the Commission retains the "net payments" allocator, U S WEST asks that the Commission confirm that facilities-based carriers may assess other carriers using its network the NANP administration costs the facilities-based carriers are assigned as a result of the revenues generated from this use of their network.

B. The Commission's Discussion Of "Code Opening Fees" May Require Clarification

In its Second Report and Order, the Commission reaffirmed that, during the transition to a new NANP administrator, incumbent LECs may continue to perform the central office ("CO") code and area code relief administration functions and may recover their costs from code users. However, the Commission properly cautioned that any code administration fees may not be "unjust, discriminatory, or unreasonable," and that a code administrator may charge fees to competing carriers only "if the incumbent LEC charges one uniform fee for all carriers, including itself or its affiliates."[9]

AT&T now asks the Commission to provide "additional guidance as to the 'reasonableness' of NXX code assignment fees":

> Specifically, the Commission should clarify that any fees charged by an ILEC for NXX code opening must be limited [to] forward-looking, economically efficient costs, if any, of numbering administration. NXX code opening charges should reflect only those costs that would also be borne by a neutral third party acting as Numbering Administrator.[10]

U S WEST does not oppose AT&T's proposed clarification, although it appears to restate the very principles set forth in the Second Report and Order. U S WEST does not, however, understand AT&T's reference to "forward-looking, economically efficient costs" given that the costs associated with CO code administration primarily involve expense such as labor and travel.

BellSouth asks the Commission to clarify that the Second Report and Order's reference to "code opening fees" does not preclude recovery of other on-going costs incurred by code administrators. U S WEST concurs in this request.[11] Costs associated with opening a new CO code are properly assessed to the cost-causer -- the carrier seeking assignment of a new code.[12] However, other code administration

[9] Second Report and Order ¶¶ 332-33.

[10] AT&T at 11 (emphasis in original).

[11] BellSouth at 9. U S WEST further agrees with BellSouth that there is no evidence in the record for the Commission's statement that incumbent LECs "can warehouse NXXs in the old NPA." Id. at 7-8.

[12] U S WEST does not understand AT&T's argument that code opening fees should be imposed retroactively. See AT&T at 11-12. There is no need to impose code opening fees retroactively on current code administrators because they have

functions (e.g., developing NPA relief plans) are performed on behalf of the entire industry serving a given area. These industry-driven costs are most appropriately recovered from all code users -- perhaps through an annual general administration charge imposed on each NXX code assigned and in use. Any fees a local code administrator imposes must, of course, be subject to the "unjust, discriminatory, or unreasonable" standard and must be uniformly imposed on all carriers, including itself or its affiliates.

C. The Area Code Relief Guidelines Require Modification

U S WEST agrees with the Commission's decision to delegate to the states the authority to implement new area codes. The Commission is absolutely correct in observing that state commissions are "uniquely positioned to understand local conditions and what effect new area codes will have on those conditions."[13]

Several petitioners now want to tie the hands of the state commissions in developing an area code plan uniquely suited for the area involved.[14] The Commission rejected these arguments before, and it should reject them again.

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generally paid 100% of the costs of code administration. Is AT&T suggesting that U S WEST's incumbent LEC should apply retroactively code opening fees on all other carriers assigned CO codes in the past (like AT&T Wireless)?

[13] Second Report and Order ¶ 272.

[14] Two petitioners make radical proposals. The New York Commission believes that the NANP should be extended to 11 digits (from today's 10 digits). NYDPS at 10-12. Omnipoint recommends that area codes cover areas beyond the boundaries of a single state. Omnipoint at 1-16. U S WEST recommends that the Commission refer both proposals to the Industry Numbering Committee for its initial consideration.

1. Number Portability Should Not Be A Precondition To Use Of Overlays

In its Second Report and Order, the Commission rejected the arguments of a handful of carriers that it should prohibit state commissions from implementing all services overlays before number portability is available.[15] These same commenters now ask the Commission to reconsider this decision, repeating their undocumented allegations that assignment of CO codes in the new area code will somehow stifle competition.[16] The failure of these petitioners to present any facts, much less new facts, is alone grounds for the Commission to dismiss these petitions.

U S WEST is sensitive to potential barriers to competition. After all, several of its subsidiaries will soon be providing local exchange services in competition with incumbent LECs. U S WEST understands that many of these markets will soon have new area codes and that, because its subsidiaries will be entering the market at a later date, they will often be assigned CO codes from the new area code. However, U S WEST's experience is that consumers quickly become accustomed to new area codes. Besides, number portability will arrive shortly -- and often co-extensively with the introduction of a new area code. It makes no sense to preclude states from adopting a relief plan which they believe best suits the long-term needs of their residents because of undocumented concerns that, at best, will last several months.[17]

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[15] Second Report and Order ¶ 290.

[16] See Cox at 1-8; MFS at 2-10; Teleport at 8-11.

[17] Consider the situation in Denver and in several other large metropolitan areas served by U S WEST's incumbent LEC. In these areas, the exhausting area code is

More important to U S WEST than the overlay vs. split issue is the need to implement new area codes timely. No carrier should be deprived of providing its services because of the unavailability of CO code resources caused by delays in implementing a new area code. Equally significant is the need to impose uniform 10-digit dialing of local calls when 10-digit dialing is imposed anywhere in the local calling area. Uniform 10-digit dialing is important, not only for competitive parity, but also to minimize customer confusion.

2. Allocation (Or Rationing) Of Remaining CO Codes In The "Old" Area Code Should Be Left To State Commissions

In its Second Report and Order, the Commission held that a state commission may not implement an overlay unless every carrier serving the area receives, 90 days before the new overlay is introduced, at least one CO code in the existing area code.[18] Several petitioners ask the Commission to delete this requirement because, depending on the circumstances, it could have the unintended effect of delaying implementation of area code relief (thereby delaying the

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already co-extensive with the free calling area. (MFS is simply wrong in asserting that the 303 code "covers the northern half of Colorado, an area extending more than 500 miles east to west." MFS at 9). Splitting a free calling area into two different area codes will be difficult for consumers to comprehend, especially if, as is likely, the free calling area is divided using the boundaries of the incumbent LEC's wire centers. In these circumstances, the industry and state commissions should not be precluded by a federal government mandate from even considering use of overlays.

[18] Second Report and Order ¶ 286. This decision appears to be a variation of a "number crunch" proposal Teleport advanced at the 11th hour, and which the rest of the industry did not have adequate time to address. See id. at n.616.

availability of a new supply to CO codes).[19] Others take the other extreme, arguing that the Commission's "one-NXX-per-carrier" remedy is inadequate because every carrier should be entitled to a CO code in the old area code for each rate center.[20]

U S WEST takes a somewhat different position. It believes that the allocation (or rationing) of remaining CO codes in an existing area code is a decision best addressed by the state commission because each situation will be different (e.g., number of CO codes remaining in existing area code, number of competitive carriers, near-term need for codes). The Washington State Commission faced this very situation two years ago when the 206 area code was near exhaust.[21] After considering all the different allocation methods proposed by various members of the industry, the Washington State Commission decided that the only equitable approach was one set forth in the industry CO code assignment guidelines: first-come/first-served. U S WEST therefore believes that allocation of remaining CO codes in the exhausting area code is a subject best addressed by a state commission in its area code relief proceeding.

3. The Commission Should Clarify That Mandatory "Take-back" May Not Be Imposed On CMRS Providers With Type 2 Connections

[19] See, e.g., BellSouth at 8; NYNEX at 11-12; PageNet at 4-6; PaPUC at 5-6; USTA at 9-11.

[20] See, e.g., AT&T at 5-7; Cox at 4; MFS at 8; Teleport at 4-7.

[21] Although a new area code was implemented two years ago, the reduced 206 area code is again facing exhaustion.

In the Second Report and Order, the Commission found that the Texas Commission's planned wireless-only overlay was unlawfully discriminatory.[22] However, the Commission declined to become involved in the Texas Commission's threat that, if forced to implement a geographic split, it would consider a mandatory pro-rata take-back of wireless numbers.[23] The Commission reasoned that this is "the kind of implementation detail that is best left to the states."[24]

U S WEST agrees with those petitioners asking the Commission to reconsider this decision.[25] Implementing a geographic split in landline networks is relatively straight-forward. The split is implemented by landline carriers which modify the translations in their switches serving the new area code. Landline customers residing in the new area code do nothing with respect to their handsets.

A very different process applies to CMRS providers. The CMRS numbers are stored in the CMRS provider's own mobile switch, and a geographic split requires a CMRS provider to modify its switch -- much like landline carriers modify their switches. However, unlike landline, CMRS carriers cannot implement a split solely by modifying its switch. Rather, a split also requires CMRS providers to manually re-program each of their customers' handsets which, in turn, requires CMRS

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[22] Second Report and Order ¶¶ 304-06.

[23] Id. ¶ 308.

[24] Id.

[25] See, e.g., AirTouch Paging at 15-22; AT&T at 12-14; PageNet at 6-7; SBC at 20-27.

customers to bring their handsets to their provider for reprogramming.[26] The record before this Commission demonstrates that CMRS providers and their customers face significant burdens in implementing geographic splits because of the costs and customer inconvenience associated with handset re-programming -- costs and inconvenience not faced by landline carriers and their customers.[27]

In summary, mandatory "take-back" of numbers in a geographic split is not technology neutral. CMRS customers incur costs and inconvenience not faced by landline customers and, unlike landline customers, must often change their local CMRS number in addition to their area code. Therefore, while CMRS providers should be encouraged to "give-back" numbers in the exhausting area code when a geographic split relief plan is adopted, no CMRS provider with Type 2 connections should be faced with a mandatory "take-back" of its numbers.

II. THE COMMISSION IGNORED THE INTELLECTUAL PROPERTY RIGHTS OF THE LECS WITH RESPECT TO DIRECTORY ASSISTANCE ("DA") AND OPERATOR SERVICES ("OS"), AS WELL AS THE RIGHTS OF THIRD PARTIES INTEGRATED INTO LECS' NETWORKS/DATABASES

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[26] Handsets must be reprogrammed because they are designed to operate on the full 10-digit telephone number, or mobile identification number ("MIN"), to deliver calls, validate subscribers, validate customers roaming from other markets, and bill. See SBC at 21.

[27] A noted economist has estimated that the introduction of a split in eastern Massachusetts will cost consumers $9 million just for their time consumed in the re-programming process. See Hausman Affidavit at 3 ¶ 8, appended to Comments of Southwestern Bell Mobile Systems, NSD File No. 96-15 (Nov. 6, 1996). Mr. Hausman further estimated that a split in this area would require the cellular industry to incur costs of between $20 and $40 million -- the equivalent of about 8-15% of the gross annual revenue from a cellular customer. Id. at 3 ¶ 7. These substantial cost increases necessarily will be reflected in the prices that cellular customers will pay for their service.

The Commission discusses DA and OS as services offered to retail customers,[28] as network elements,[29] and as items incorporated in the dialing parity obligation. With respect to the latter obligation, the 1996 Act requires LECs to permit "competing providers . . . to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing[s]."[30] Unlike the definition of network element, the Section 251(b)(3) obligation nowhere mentions the term "database" or otherwise suggests that LECs must provide database access, even in those circumstances where identified information (e.g., telephone numbers and directory listings) is included in a database.

U S WEST agrees with USTA that a proper interpretation of that Section would not require third party access to LEC databases. Rather, it requires LECs to provide information on telephone numbers and directory listings such that a competing provider could produce a DA/OS offering;[31] and it requires the LEC to accept the telephone numbers and listings of those customers being served by new entrants and to include that information in the LECs' white pages directories and DA/OS databases.[32] But, the Section 251(b)(3) "[n]ondiscriminatory access

[28] As such, the services are subject to the resale provisions of Section 251(b)(1). Second Report & Order ¶ 118.

[29] Id. ¶ 118.

[30] 1996 Act, 110 Stat. at 62 § 251(b)(3).

[31] See USTA at 3 ("The appropriate emphasis should be on ensuring that customers of new market entrants can obtain access to incumbent LECs' listings, in electronic and print formats.")

[32] Id. at 4 ("Nondiscriminatory access to directory listings means all carriers could arrange to have their customers' names listed in other carriers' directories and directory assistance data bases [sic] without discrimination.").

[obligations] to directory listings does not mean that LECs must provide competitors their directory assistance databases."[33] The Commission should, therefore, reconsider this aspect of its decision in its Second Report & Order.

In addition to the fact that the Commission's interpretation of Section 251(b)(3) goes beyond the literal language of that provision, there is an additional critical infirmity to the Commission's determination that LECs must make their DA/OS databases available to third parties, including those "adjuncts" associated with such services. In so doing, the Commission ignored not only the intellectual property rights of LECs but those of third parties whose intellectual property LECs have been licensed to use, often for internal use only. This intellectual property permeates LECs' service offerings, networks and databases. The Commission is without power to seize or destroy the intellectual property of a company, at least, not without affording just compensation for the value of the property.

There is certainly nothing in the 1996 Act that requires the type of unreflected conscriptive approach to intellectual property reflected by the Second Report and Order. Nowhere is there an indication in the 1996 Act that Congress intended the Commission to appropriate such intellectual property or to diminish the value of such property to its owners by placing the LECs in the position of having to abide by what amounts to a Commission-mandated "compulsory license," in contravention of copyright and patent law[34] and various state trade secret

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[33] Id.

[34] See, e.g., Fox Film Corporation v. Doyal, 286 U.S. 123, 127 (1932) (owner of copyright may refrain from licensing property); Dawson Chemical Co. v. Rohm &

protection statutes.[35] In the absence of such Congressional pronouncement, the Commission should not regulate in a manner that assumes such authority. Indeed, just the opposite should be the case, as Commission jurisdiction to alter intellectual property rights cannot generally be inferred under the Communications Act.[36]

A. LECs' Wholly-Owned Intellectual Property

Ignoring for purposes of these comments the Commission's treatment of the LECs' DA/OS services as "network elements," the Commission need not have granted access to the LECs' databases (including the internal equipment or software[37] associated with those databases, as well as "adjuncts") to reach "nondiscriminatory access" with respect to dialing parity obligations. LECs can comply with their dialing parity obligations vis-à-vis their competitors by allowing competing providers to avail themselves of the ability to purchase those services pursuant to resale. Alternatively, competing providers could be given the

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Haas Co., 448 U.S. 176 (1980) (compulsory licensing is a rarity in patent system); Miller Insituform, Inc. v. Insituform of North America, 830 F.2d 606, 609 (6th Cir. 1987) (refusal to license patent not a violation of antitrust law).

[35] Compare SBC at 14.

[36] See, e.g., Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394, 406 n.11 (1974) (Commission has no power to alter rights established under the Copyright Act); Malrite T.V. of N.Y. v. FCC, 652 F.2d 1140, 1148 (2nd Cir. 1981) (Commission does not have jurisdiction to adopt rules "inconsistent with a basic arrangement" of the Copyright Act), cert. denied, 454 U.S. 1143 (1982). Compare United Video, Inc. v. FCC, 890 F.2d 1173, 1185-87 (D.C. Cir. 1989).

[37] SBC mentions "special software to determine how many operators should be on duty at any given hour of any given day." SBC at 11. It does not state whether this software was internally or externally generated intellectual property. However, the problem exists whichever is the case, only being exacerbated if externally developed.

information necessary for them to build their own DA and OS databases[38] or could contract with third parties for these services.[39] The Commission should so rule.

What the Commission should not do is continue the appropriation of LECs' intellectual property,[40] as that property is resident in the databases either through software or searching capabilities (representing LEC innovation and ingenuity), even if the Commission could somehow devise a compensation regime that would constitutionally pass muster. As the Commission recognized with respect to access to proprietary elements in its First Report and Order, "prohibiting [LECs] from refusing access to proprietary elements could reduce their incentives to offer

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[38] U S WEST agrees with the notion advanced by MFS that the Commission's discussion of access to directory listings is a confusing one when incorporated into a discussion of directory assistance access. MFS at 10-13. While we do not necessarily agree with MFS' substantive arguments, directory listings are used to publish directories. Nonlisted customers will not have a "directory listing." Information about these customers, however, would be necessary to provide directory assistance, where individuals can get telephone number information pertaining to those customers who have no directory listing. The Commission should address this confusion. The information U S WEST addresses here (that necessary to build a DA/OS database on one's own) would require the inclusion of nonlisted subscriber information, while a product offering to a directory publisher would exclude such information.

[39] As U S WEST has noted previously, DA/OS services are quite competitive. Such services are provided, for example, by third parties (such as Excel and Metromail) on behalf of a number of principles. See also Ameritech at 11. Indeed, it is these "agents" that are the beneficiaries of many of the Commission's mandates in this area. And, these "agents" are not single-purpose providers for DA/OS only but have relationships with directory publishing operations and general marketing database businesses.

[40] An appropriation, or taking, of that property has clearly occurred. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014-15 (1984).

innovative services."[41] Clearly, LECs will not spend money on research and development if innovations they develop with respect to the provision of competitive services (which DA and OS will certainly become, even utilizing alternative access mechanisms) must automatically be turned over to competitors.[42] For these reasons, the Commission should reconsider its mandate that LECs provide more than read-only (per-query) access to their DA/OS databases.[43]

B. Third Party Intellectual Property Used Pursuant To Licenses

Like SBC, U S WEST's DA and OS systems utilize the intellectual property of third parties pursuant to the terms of a license.[44] Many of those license rights are from AT&T, some pre- and some post-divestiture. Others, such as equipment vendors and Bellcore, have also granted U S WEST licenses to use their intellectual property -- often for internal use only. The approach the Commission has currently taken compromises the intellectual property rights of LECs and third parties and

[41] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, First Report & Order, rel. Aug. 8, 1996 ¶ 282 ("First Report and Order".

[42] See Ameritech at 11. See also, e.g., Kewanee Oil Company v. Bicron Corporation, 416 U.S. 470, 480 (1974) (right of exclusivity provides "an incentive to risk the often enormous costs in terms of time, research, and development").

[43] Right now, it may not be possible for a LEC to actually depress access to certain of its intellectual property, such as search engines and capabilities. However, were the Commission to reconsider its mandate, certain gateway functionalities could be developed to create a form of "firewall" so that only raw data on a per query basis would be provided to competitors. While the Commission would have to allow for sufficient time for such gateway to be put in place, this type of access would allow a competitor to fully perform DA/OS functions.

[44] SBC at 11-13.

unreasonably imposes risks on LECs that they will be pursued for breaches of contract or infringement actions.[45]

For the same reasons discussed above, the Commission should reconsider its current position with respect to access to DA/OS databases. That access should be circumscribed to a per-query, read-only access (preferably through a gateway, with time to establish one). Access should not be required to the totality of the databases, including proprietary software or other intellectual property provided LECs by third parties.

III. U S WEST AGREES WITH NYNEX THAT THE COMMISSION SHOULD RECONSIDER ITS DA/OS BRANDING REQUIREMENTS.

U S WEST agrees with NYNEX that the Commission should reconsider its branding requirements with respect to DA/OS. The Commission's fundamental branding requirement, i.e., that an incumbent LEC identify itself as a competitor, is unlawfully compelled speech in violation of the First Amendment, to the extent that a LEC does not desire to communicate such information.

There is an additional First Amendment problem associated with compelling an incumbent LEC to remain silent with respect to its traffic if it is incapable of branding traffic of its competitors. Thus, we support NYNEX's request that the

[45] Patent and copyright law, as well as contracts often pertain to the software. Licenses typically grant the right to use intellectual property, but not to sublicense it to others. Furthermore, to the extent that technical data supplied with a LEC's equipment or software are proprietary, the LEC is normally under an obligation to keep such data confidential. A LEC's use of software to provide services for resale may be covered by its license or confidentiality agreements, but the same use of equipment or software by a competing carrier, if not authorized by the licensor, could infringe on the intellectual property of the licensor.